

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of TASHERA JENNINGS,
MARTIANA MITCHELL, and LIKENYA
THOMAS, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

LESI BEARD,

Respondent-Appellant.

UNPUBLISHED
April 19, 2005

No. 258210
Oakland Circuit Court
Family Division
LC No. 01-657930-NA

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating her parental rights to the minor children under MCL 712A.19b(3)(b)(i), (g), and (j). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Respondent's parental rights were terminated at the initial disposition. She argues on appeal that the trial court erred in relying on her no-contest plea to the petition because it was not knowing and voluntary and that she was denied the effective assistance of counsel. We disagree.

Respondent had a prior protective services history for physical abuse of Martiana in 2001, as well as a prior history in New York. Respondent participated in services, and Martiana was returned to her care in November 2002. This proceeding commenced in March 2003 when Martiana again alleged that respondent beat her with an extension cord on more than one occasion, and Tashera also alleged that respondent beat her. Physical examination of the children showed numerous wounds and scars on their bodies. All three children averred that respondent beat them and that they were afraid of her. Petitioner requested termination at the initial disposition, and respondent entered a no-contest plea after slightly amending the description of Martiana's wounds in the petition and amending the petition to state that the children's numerous scars had been caused while playing. The petition alleged respondent's prior protective services history, criminal history, and long-term substance abuse, and respondent's admission to beating Martiana. Respondent acknowledged that she had extensive discussions with counsel regarding the petition and stated that she did not have any further

questions concerning its content. The trial court fully advised respondent of her rights, including the right to have a trial instead of entering a plea. The trial court advised respondent that if she pleaded no contest and other evidence was presented supporting the allegations, then the allegations would be considered true. The caseworker provided independent testimony based on her first-hand investigation affirming the facts in the petition.

Following a later best interests hearing, the trial court referee recommended termination of respondent's parental rights, finding that the statutory grounds for termination had been established and that termination was not clearly contrary to the children's best interests. Respondent requested a review of the referee's recommendation but did not raise the issue that her plea was not knowing and voluntary, or the issue of ineffective assistance of counsel.

Respondent's issues were not raised in the trial court, and are therefore not preserved for review. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Both are constitutional issues, which this Court reviews de novo. *Kampf v Kampf*, 237 Mich App 377, 381; 603 NW2d 295 (1999). Unpreserved constitutional issues are reviewed for plain error that affects substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The evidence did not show that respondent's no-contest plea was unknowing and involuntary, and the trial court did not err in finding that the statutory grounds for termination were established by her plea. Respondent's psychological evaluation indicated that respondent was not easily intimidated, and the fact that she merely answered "yes" when questioned by the trial court is not indicative of the fact that the legal process intimidated her. Respondent was somewhat familiar with the procedure in child protective proceedings, having been a respondent in 2001, and participated in suggesting amendments to the petition in this case. She knew that termination of her parental rights was at stake and expressed anger and grief over that fact during her psychological evaluation. Respondent had been represented by the same attorney in her 2001 child protective proceeding and conferred with counsel often. There was no indication that respondent hesitated to ask counsel questions. At the best interests hearing, respondent reaffirmed her understanding that she had pleaded no contest to the petition at her last court appearance. Respondent's mistaken understanding later in the proceeding that she still had visitation with the children did not indicate that her prior plea had been unknowing or involuntary.

Likewise, the evidence did not show that respondent was denied the effective assistance of counsel. Respondent asserts that counsel did not ensure that she understood the nature and consequences of her plea and erred in allowing the best interests hearing to proceed in respondent's absence. To establish a claim of ineffective assistance of counsel, respondent was required to show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced respondent that there is a reasonable probability that, but for counsel's error, the result would have been different. *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2001). In reviewing a claim of ineffective assistance of counsel arising out of a plea, the question is whether the plea was made voluntarily and with understanding. *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993). Ineffective assistance of counsel results when counsel fails to explain to the client the nature and consequences of the plea and the range and consequences of available courses of action so as to allow respondent to make an intelligent and informed choice. *People v Jackson*, 203 Mich App 607, 614; 513 NW2d 206 (1994).

As discussed above, there was no indication that respondent did not fully understand the nature and consequences of her plea, and that other options were available to her. With regard to respondent's absence from the best interests hearing, respondent had no absolute right to be present at the hearing. MCR 5.973(D)(2) and (3); *In re Vasquez*, 199 Mich App 44,48-49; 501 NW2d 231 (1993). Respondent's counsel was under no obligation to ensure respondent's prompt arrival or attendance, and once the hearing commenced, counsel's presence was required in the courtroom to advocate for respondent. The trial court noted that the desk personnel's failure to advise respondent to enter the courtroom after she arrived was no fault of counsel. The evidence showed that respondent was effectively represented by counsel at the entire hearing, and that proofs were reopened to allow respondent an opportunity to testify.

In conclusion, the evidence did not show that respondent's plea was unknowing or involuntary, and the trial court did not err in relying upon it. Respondent was not denied the effective assistance of counsel.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Kurtis T. Wilder